Fair Political Practices Commission

M E M O R A N D U M

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
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Date: February 24, 2003

Subject: Recall Election Issues

Summary: In response to questions about the pending recall effort, an updated Recall Elections fact sheet is presented to the Commission for consideration and approval. The revised Recalls fact sheet (attached) updates the 1999 version to include statutory changes made to the Act[1] by Proposition 34. The fact sheet covers the disclosure obligations and limits applicable to candidates and committees involved in a state recall election.

As discussed in this memorandum and the fact sheet, neither the state elected official who is the target of a recall effort nor the proponent of the recall measure is subject to contribution limits for the recall election. The fact sheet and this memorandum conclude, however, that the contribution limits of Proposition 34 do apply to the individuals on the ballot seeking to replace the elected state officer if the recall succeeds. Such individuals are candidates within the meaning of section 82007, seeking elective state office, and are subject to the contribution and voluntary expenditure limits of the Act. In addition, all candidates and committees that are raising and spending funds in connection with a recall election have full reporting and disclosure obligations under the Act.

1. Introduction. The power of the voters to remove an elective officer by recall is set forth in the California Constitution Article 2, sections 13-19, and Elections Code sections 11000 et seq. Recall elections are unique because they have characteristics of both a ballot measure and a candidate election. This is especially so, since amendments to Article 2 in 1994 changed how recalls work in California. Prior to 1994, the vote on whether to remove an elected official from office, and if the recall succeeded, the subsequent election to choose a successor candidate, were held separately. Amendments to Article 2 and the Elections Code provided that recall elections and the choice of a replacement candidate are consolidated on the same ballot. (Cal. Const. Art. 2, § 15, amended by Stats. 1994 Res. ch. 59 (S.C.A. 38 (Prop. 183) approved November 8, 1994; Elections Code §§ 11381-11386.)

Because recall elections are a hybrid between a ballot measure and a candidate election, recalls have given rise to numerous questions of interpretation for the FPPC in the past. The Commission has not yet, however, interpreted the provisions of Proposition 34 in the context of

[1] Government Code sections 81000-91014. Commission regulations appear at Title 1, sections 18109-18997 of the California Code of Regulations.

a state recall effort.

2. Application of Proposition 34's Contribution Limits to State Recall Elections.

A. Target of Recall. Proposition 34 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to oppose a recall. Section 85315 states:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

The statute is consistent with past FPPC advice stating that the target of a recall is not subject to contribution limits in his or her efforts to oppose the recall. (E.g., *Roberti* Advice Letter, No. A-89-358.) Section 85315(b) further provides that after the failure of a recall petition or a recall election, the elected state officer's recall committee must wind down its activities and dissolve. The committee's remaining funds are treated as surplus under section 89519(b) and must be spent within 30 days.

B. Proponent of Recall. Under the Act, a recall falls within the definition of a "measure." Section 82043 of the Act defines "measure" as follows:

> "'Measure' means any constitutional amendment or other proposition which is submitted to a popular vote at an election by action of a legislative body, or which is submitted or is intended to be submitted to a popular vote at an election by initiative, referendum or recall procedure whether or not it qualifies for the ballot."

Accordingly, the FPPC has usually analyzed recall elections following the rules applicable to ballot measures, rather than those applicable to candidate elections. The Supreme Court case *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, stands for the proposition that contribution limits do not apply in ballot measure elections. The court struck down a Berkeley ordinance placing a $250 limit on contributions to support or oppose ballot measures as violating First Amendment rights of association and expression. The Court reasoned that the usual justification for contribution limits – preventing corruption or the appearance of corruption of a candidate or an elected official – was not present in the ballot measure situation, and that ballot measure elections involve issue discussion. *Id.* at 297-298. It

is important to observe, however, that *Citizens Against Rent Control v. Berkeley, supra,* did not discuss recall elections or classify recall elections as ballot measures. The case only analyzed "non-candidate" controlled ballot measure committees, and emphasized the differences between "issues" that appear on the ballot and candidate elections.

Because recalls fall somewhere in-between a ballot measure and a candidate election, a statutory scheme could arguably classify them either way.[2] Section 82043 of the Act, however, includes recalls within the definition of "measure," and the FPPC's interpretation necessarily proceeds under that framework. Accordingly, the FPPC has consistently advised that the contribution limits of the Act do not apply to proponents or opponents of a recall measure.

C. Replacement Candidates.

Section 82007 of the Act defines a "candidate" as follows:

> "'Candidate' means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. 'Candidate' also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. 'Candidate' does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971."

The Act's definition of "candidate" is broad and includes both the replacement candidates and the elected state officer who is the subject of the recall.

Proposition 34 enacted contribution limits applicable to state candidates. Among the limits in Chapter 3 of the Act, section 85301 restricts contributions from persons to state candidates as follows:

- $ 21,200 per election to "any candidate for governor" (§ 85301(c).)

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[2] For example, the City of San Diego's municipal campaign ordinance defines a "recall" as a candidate election, rather than a measure. (San Diego Municipal Code §§ 27.2903(b)(4) and (k).) Therefore, San Diego concluded that the ordinance's $250 per person contribution limit applied to all candidates and committees involved in a recall election. The City of San Diego sought advice from the FPPC as to whether this interpretation conflicted with state law. The *Angus* Advice Letter, No. A-97-173, concluded that state law did not preempt the local law's classification of a recall as a candidate election and application of the contribution limit.

- $ 5,300 per election to "any candidate for statewide elective office" except a candidate for governor (§ 85301(b).)
- $ 3,200 per election to "any candidate for elective state office" other than a statewide candidate (§ 85301(a).)

The replacement candidates in a state recall election are "candidates" within the meaning of section 82007, who are seeking election to state office. Under a plain meaning interpretation of the Act, as amended by Proposition 34, the contribution limits of chapter 3 of the Act apply to replacement candidates in a state recall election.

Though the FPPC has in the past concluded that an entire recall election including the replacement candidates, were part of a measure election, not subject to limits,[3] this interpretation was superceded by Proposition 34. Proposition 34 added contribution and voluntary expenditure limits to the Act for state candidates. Unlike the contribution limit schemes preceding it (Propositions 73 and 208), Proposition 34 contains a specific provision concerning recalls. As discussed above, section 85315 expressly provides that an elected state officer who is the target of a recall effort may accept contributions to oppose the recall without regard to the contribution limits of Chapter 3. Neither section 85315, nor any other section of the Act, however, exempts the individuals who are seeking state office as replacement candidates from the contribution limits. The fact that Proposition 34 specifically exempts the target of a recall from the contribution limits, but is silent as to the replacement candidates, argues that Act's contribution limits do apply to such candidates.[4]

The only argument that the Act's contribution limits should not apply to the replacement candidates is that it would be somehow unfair or raise an equal protection issue for candidates running for the same office, on the same ballot, to be subject to different contribution limits.

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[3] FPPC advice reaching this result was contained in several advice letters, including the *Burgess* Advice Letter, No. I-94-393, and the *Davidson* Advice Letter, No. I-97-103, which was rescinded by the Commission, as well as the 1999 recall elections fact sheet that is being updated. The *Davidson* letter did not involve a recall election, rather a charter reform proposal that was being submitted to popular vote in Los Angeles in 1997. If the charter reform proposal succeeded, candidates to the charter revision commission would be elected. The candidates for the charter revision proposal were on the same ballot as the charter reform measure. The question arose whether the individuals appearing on the ballot for the charter reform commission measure were subject to the contribution limits of Proposition 208 applicable to local candidates. The letter reasoned that the election of charter reform commission candidates was so closely linked to passage of the measure itself, that the individuals seeking election to the commission were running as part of the ballot measure. Because the Supreme Court has prohibited limits on contributions to ballot measure commitees, and by analogy to the FPPC advice on recall elections, the letter advised that Proposition 208's limits did not apply to contributions raised in support of or opposition to the charter reform measure, or to the candidates running for seats on the commission on the same ballot. The Los Angeles Ethics Commission and City Attorney's office strongly disagreed with this conclusion and requested the Commission to review the letter. The Commission reconsidered the issue at its May 1997 meeting, and rescinded the *Davidson* letter.

[4] "As the maxim [expressio unius est exclusio alterius] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." (Footnotes omitted.) Sutherland Statutory Construction § 47:28.

Though the recall situation is unique, we do not think the fact that Proposition 34 exempts the target of the recall election from contribution limits, but applies those limits to replacement candidates, violates the equal protection rights of the replacement candidates.

Under equal protection analysis, the replacement candidates are not members of a suspect class, and thus, the statute must have a rational basis to draw a distinction between the replacement candidates and the elected state officer who is the target of a recall. (*See* e.g., *Institute of Governmental Advocates v. Fair Political Practices Commission* (E.D. Ca. 2001) 164 F.Supp.2d 1183.) The California Constitution and the Elections Code clearly distinguish between the elected state officer that is the target of the recall and the replacement candidates. The former is subject to the special recall procedures and the latter are treated as candidates in a special election. An attempt to recall an elected state officer is a unique procedure that is by law separate and distinct from the usual candidate election process. For example, an elected state officer who successfully defends a recall attempt is entitled to seek reimbursement for "election expenses legally and personally incurred." (Cal. Const. Art. 2, § 18.)

In a recall election, there really are two separate questions being presented to the voters. The first, fundamental question, is "should the elected official be removed from office?" The recall measure qualifies for the ballot through a signature gathering process like an initiative measure, and is defined as a "measure" under the Act. If the recall succeeds, the second question is selecting a replacement candidate in what is akin to a special election to fill a vacancy. The fact that the decisions on these two questions are consolidated on one ballot for cost savings and expediency does not mean that the target of the recall and the replacement candidates are all in the same position, running against each other for an open seat.

Under the plain meaning of the statute, it seems clear that the individuals running to replace a recalled official constitute "candidates" for elective state office under section 82007 and that the contribution limits of Chapter 3 of the Act apply to them.

3. Disclosure Obligations of Candidates and Committees Involved in the Recall. All candidates and committees that are raising and spending funds in connection with a state recall election have full reporting and disclosure obligations under the Act. The disclosure obligations of the proponent of a recall are triggered when the proponent serves the target of the recall with the "notice of intention to circulate a recall petition" pursuant to Elections Code sections 11006 and 11021.

An officeholder who is the subject of a recall must disclose all contributions received and expenditures made in connection with the recall. A replacement candidate must also disclose all contributions received and expenditures made in connection with the recall election. The filing obligations of candidates and committees involved in a recall election are discussed in more detail in the attached fact sheet.

Recommendation: Staff recommends that the Commission approve the attached recall elections fact sheet which has been updated to reflect changes to the Act by Proposition 34.

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